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NO. 1529

IN THE

Supreme Court of the United States

October Term, 1970

LEE ALMENDAREZ, *Petitioner*

v.

THE STATE OF TEXAS, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

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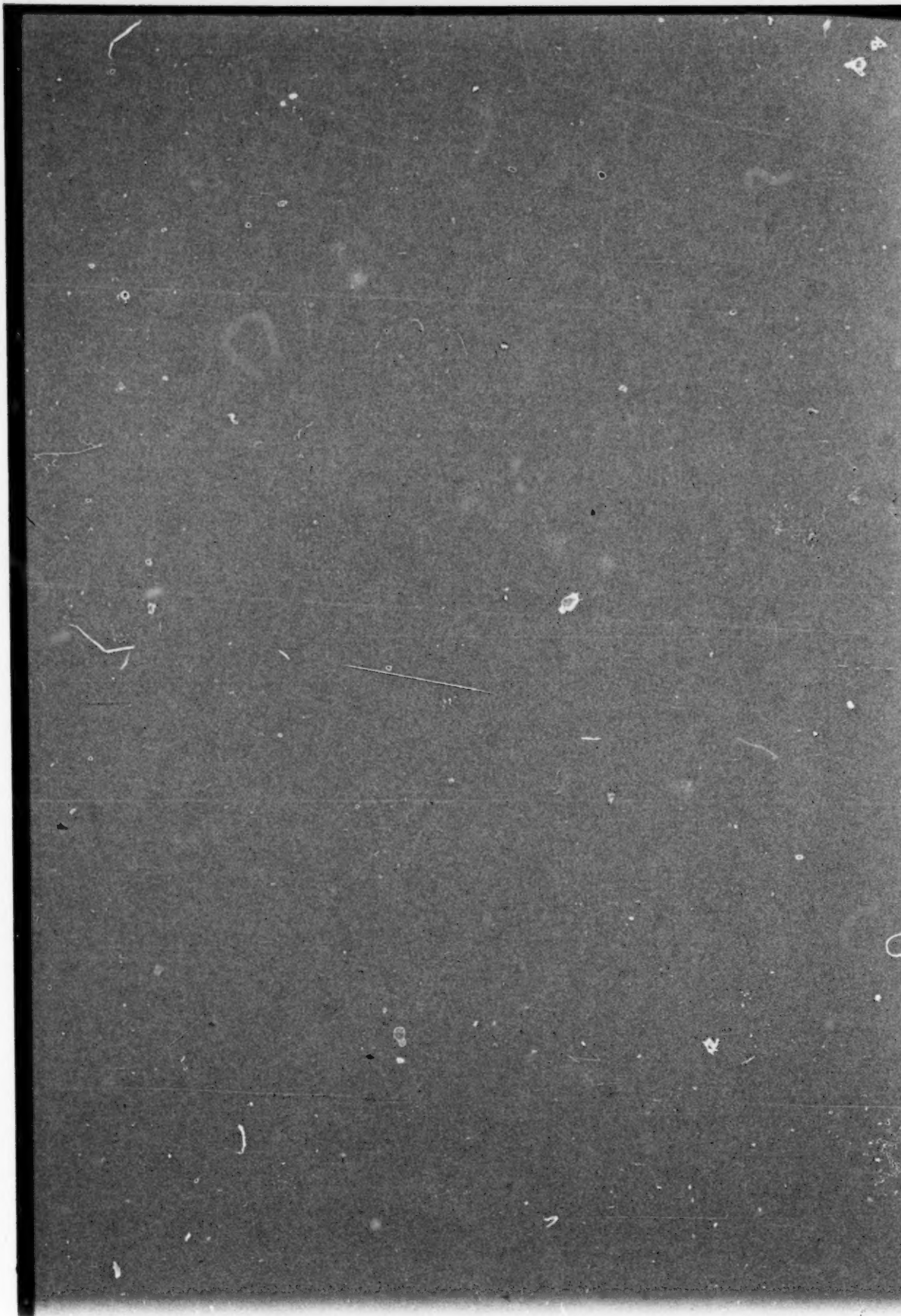

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LEE ALMENDAREZ, Petitioner, prays that a Writ of Certiorari issue to review the judgment of the Court of Criminal Appeals rendered in the above entitled cause on November 10, 1970. Petitioner's First Motion for Rehearing was overruled without written Opinion on December 31, 1970.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Criminal Appeals of Texas in the above entitled cause is attached hereto as Appendix A.

JURISDICTION

Judgment of the Court of Criminal Appeals of Texas was entered on November 10, 1970. Timely petition for rehearing was submitted to the said Court and relief thereon was denied on December 31, 1970. Jurisdiction of this Court is invoked under 28 U.S.C.A. § 1254 (1).

QUESTION PRESENTED

Have the Petitioner's rights under the substantive provisions of the Fourth, Fifth, and Fourteenth Amendments to the Constitution of the United States been violated where a state conviction was had upon evidence obtained subsequent to a warrantless arrest of Petitioner and such arrest without probable cause rendered the search incidental to the arrest improper under the Fruits of the Poisonous Tree Doctrine.

STATEMENT

The Petitioner was tried and convicted in the 176th District Court of Harris County, Texas, on an indictment charging him with unlawful possession of a narcotic drug, to-wit: Marijuana.

Petitioner contended during the course of the trial that Petitioner's warrantless arrest was unlawful and that the tender of evidence offered by the State was therefore inadmissible being in violation of Petitioner's rights under the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States. In support of Petitioner's objections, Petitioner cited *Spinelli v. United States,* 89 S.Ct. 584 (1969) as authority for the suppression of evidence tendered against the Petitioner. All such objec-

tions and motions were overruled and all testimony and evidence tendered was allowed to be entered into evidence at the trial.

REASONS FOR GRANTING WRIT

This Honorable Court should grant Certiorari herein so that it may discuss the substantive provisions of the Fourth, Fifth and Fourteenth Amendments of the Constitution of the United States and it may effectively explain to the State of Texas its precise holding in *Spinelli (supra)* and all of this Court's recent decisions dealing with the interrelationship of the Fourth, Fifth, and Fourteenth Amendments since the Court of Criminal Appeals of Texas has been unable to apply the federal standard to the great detriment of Petitioner.

Petitioner's arrest was made upon information from an unnamed informant. Testimony of the arresting officers show it abundantly clear that the test in *Aguilar v. State of Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964) was not met in that the officers failed to elicit from the informer any underlying circumstances or factual details to support the informer's conclusions, nor did the officers make any attempt to support the credibility of the informer or that the information received was reliable. The testimony further reveals that the trial court ignored all standards set out by this Honorable Court in *Spinelli (supra).*

The Court of Criminal Appeals of Texas in its Opinion in Appendix A, infra, indulges in innuendos for which there is no basis in fact, where the Court states, "There would appear to be some indication that the informer

spoke with personal knowledge or had gained his information in a reliable way."

The Court of Criminal Appeals of Texas bases its opinion on *Draper v. United States*, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327 (1959). Petitioner's contention throughout has been that the Aguilar and Spinelli cases, Supra, control this case. Mr. Justice White in his concurring opinion in Spinelli indicates that the Draper case should be confined to its own facts and that a full scale reconsideration of that case may be in order. Petitioner submits this case is appropriate to reexamine the laws related to information which serves as either a basis for a warrantless arrest or for the issuance of a warrant by a magistrate.

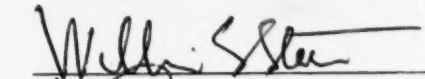
Petitioner further would urge this Honorable Court to clarify the law on probable cause and searches and seizures as expressed in recent cases as it should be applied to warrantless arrest as well as affidavits made for the issuance of warrants. It appears that the Texas Code of Criminal Appeals construes the law to be that less information is required for making an arrest without a warrant than is required by officers making affidavits in applying for the issuance of a warrant.

CONCLUSION

It is respectfully submitted that this Honorable Court should grant Petitioner's Petition for Writ of Certiorari and reverse and remand said cause to the Court of Criminal Appeals of Texas for action consistent with the opinions of this Court so that there will be no infringement on or curtailment of Petitioner's Constitutional guar-

antees under the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States.

Respectfully submitted,



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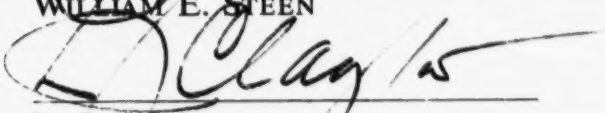

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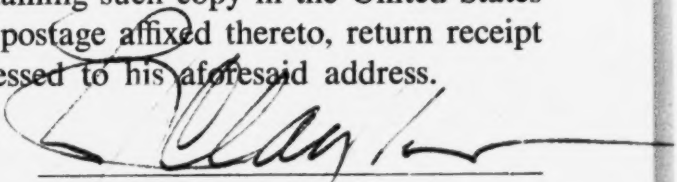
CERTIFICATE OF SERVICE

I, L. J. Clayton, Attorney for Petitioner herein, hereby certify that on the 29th day of March, A.D., 1971, I served a copy of the foregoing petition for Writ of Certiorari to the Court of Criminal Appeals of Texas upon the Honorable Crawford C. Martin, Attorney General of Texas, at the Capitol Building, Austin, Texas, by depositing an envelope containing such copy in the United States Mail with first class postage affixed thereto, return receipt requested, and addressed to his aforesaid address.



L. J. CLAYTON

APPENDIX A

No. 43,219

LEE ALMENDAREZ, Appellant,

v.

THE STATE OF TEXAS, Appellee.

APPEAL FROM HARRIS COUNTY

OPINION

This is an appeal from a conviction for the possession of marijuana with the punishment assessed by the jury at life imprisonment.

In his sole ground of error appellant contends there was no probable cause for his warrantless arrest and that the fruits of the search incident to such arrest were inadmissible in evidence.

Michael Chavez, who had been a narcotics officer with the Houston Police Department for 15 years, testified that on March 18, 1968, at approximately 4:25 p.m. he was on duty with Officers Garcia, Oaks and Jackson when he received instructions by telephone to proceed to a given address to contact an informer. Shortly thereafter at the intersection of Market and McCarty Streets in Houston he left the other officers in the unmarked police vehicle and contacted an informer who had on two previous and recent occasions given him information which had proved to be true and correct. The informer gave Officer Chavez information concerning the appellant whom Chavez had

known for approximately a year and whom he had under "on and off" surveillance for the preceding three weeks. The informer told Chavez that within the next few minutes the appellant and a Latin female companion would be in the vicinity of Philmore and Daugherty Streets and that both would be in possession of marijuana. The informer revealed that the appellant would be driving a 1956 yellow and white Pontiac automobile bearing license number NLG 646, and that the female would be driving a 1968 gold Plymouth with a black top bearing license number NSH 701. Chavez was told the marijuana would be somewhere in the two automobiles described.

Chavez related that he had no time to obtain a search warrant and drove immediately the 10 or 12 blocks to Philmore and Daugherty Streets, arriving within three or four minutes. There he recognized the appellant whom he knew driving the described Pontiac and following a Latin female in her early twenties who was driving the described Plymouth. The license numbers on the vehicles corresponded to the numbers given by the informer.

Chavez testified the officers signaled the two to pull to the curb but they proceeded for half a block and turned into a parking lot. Chavez then went to the female's vehicle while the other officers approached the appellant.

Officer J. D. Oaks testified that as appellant got out of the car he placed his hand in his left pants pocket. Oaks grabbed appellant's hand and pulled it out of the pocket and found the appellant holding a hand rolled marijuana cigarette. When the trunk of the car was opened Officer Jackson related there was strong marijuana odor. The search revealed 92 pounds of a green plant substance in three army duffle bags and various paper bags. One small

bag of marijuana was found in the Plymouth. The chain of custody of the plant substance was established and the chemist's testimony reflects that an analysis thereof showed the same to be marijuana. He estimated the amount sufficient to make at least 120,000 cigarettes salable at $1.00 apiece.

In urging the lack of probable cause for the warrantless arrest appellant relies upon Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 and Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637, both of which decisions dealt with the sufficiency of an affidavit presented to a magistrate for the issuance of a search warrant to reflect probable cause.

It is here observed that Officer Chavez had received previous reliable information from the informer and there were therefore underlying circumstances as to the officer's conclusion that the informer was credible and his information reliable. It is true that Officer Chavez testified he did not ask the unidentified informer how he knew the marijuana was where he said it was. He was not told by the informer that the informer had personally observed the contraband or had received the information from someone else. The informer did describe the automobiles with particularity, including the license numbers, and knew that the marijuana was contained therein and where the appellant and his companion would be, and was himself only a few blocks from such vicinity. There would appear to be some indication that the informer spoke with personal knowledge or had gained his information in a reliable way. At the point of interception every fact related by the informer except the presence of marijuana was verified. The arrest and search followed.

It appears that this case is controlled by Draper v. United States, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327. Hereford, the Government's informer in the Draper case, did not state the way in which he had obtained his information. He reported, however, that Draper had gone to Chicago the day before by train and that he would return to Denver by train with three ounces of heroin on one of two specified mornings. Hereford described with some particularity the clothes Draper would be wearing upon his return to Denver. The police upon meeting the inbound Denver train on the second morning specified by the informer Hereford saw a man whose dress corresponded precisely to Hereford's detailed description. It was then apparent that Hereford had not been fabricating his report out of the whole cloth and that all but the critical fact with respect to the possession of narcotics had been verified. The search which followed Draper's arrest was upheld.

The Fifth Circuit Court of Appeals in United States v. Acosta, 411 F.2d 627, held that neither Aguilar nor its explication in Spinelli detracted from the continued vitality of Draper. There, in a fact situation similar to the case at bar, the Court said:

> "The instant case is of the Draper type. Here there was only a general description of the defendant but a specific description of the vehicle including the license number. The first tip from the informant was that the heroin would be smuggled but he was not certain as to the delivery point. The next tip, some two or three hours later, confirmed the delivery and the route of travel. This resulted in the agent being on the lookout on a specified route for a vehicle of specific description being driven by a young Mexican

male. At the time of interception every fact stated by the informer except the presence of the heroin was verified. The arrest and search followed. This was the precise case in Draper. In addition, here as in Draper, there is ample evidence of the reliability of the informer, the agent having testified as to previous use of the informer and of his reliability in those instances."

Acosta was quoted with approval by this court in Rangel v. State, 444 S.W.2d 924, which is also authority for the conclusion we reach that the officer had probable cause for the warrantless arrest of the appellant and that the search incident thereto was legal and fruits of such search admissible in evidence. See also Article 14.03, V.A.C.C.P.; Alaniz and Villarreal v. State, ____ S.W.2d ____ (No. 43, 092).

There being no error, the judgment is affirmed.

ONION, Judge

(Delivered November 10, 1970)

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Petitioner

v.

THE STATE OF TEXAS,

Respondent

On Petition for Writ of Certiorari to
The Court of Criminal Appeals of Texas

BRIEF FOR RESPONDENT IN OPPOSITION

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THE STATE OF TEXAS,

Respondent

On Petition for Writ of Certiorari to
The Court of Criminal Appeals of Texas

BRIEF FOR RESPONDENT IN OPPOSITION

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Now comes The State of Texas, Respondent herein, and files this his Response in reply to Petitioner's Petition for Writ of Certiorari heretofore filed herein.

OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas is reported at 460 S.W.2d 921 (Tex.Crim., 1970). A copy is attached to the Petition as Appendix "A" at pages 7 to 11.

JURISDICTION

The jurisdictional requisites would appear to be adequately set forth in the Petition, although Respondent disputes Petitioner's contention that any

rights guaranteed by the United States Constitution have been denied.

QUESTIONS PRESENTED

Petitioner presents one question for review by this Court. This question may be restated as follows:

Was there sufficient probable cause for Petitioner's warrantless arrest and were the fruits of the search incident to such arrest admissible in evidence?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States are cited by Petitioner as being involved in this case.

STATEMENT OF THE CASE

Petitioner was tried before a jury and convicted of unlawful possession of a narcotic drug, to-wit: Marihuana, in the 176th District Court of Harris County, Texas. He was sentenced to life imprisonment in the Texas Department of Corrections.

The crime for which Petitioner was tried and convicted occurred on March 18, 1968, in Houston, Harris County, Texas. Officer Michael Chavez, who had been a narcotics officer with the Houston Police Department for fifteen years, and three other officers received instructions by telephone to proceed to a given address to contact an informant who had on two previous and recent occasions given him information which had proved to be true and correct. The informant gave Officer Chavez information concerning Petitioner whom Chavez had known for approximately a year

and on whom he had been maintaining an "on and off" surveillance for the preceding three weeks. The informant told Chavez that within the next few minutes, Petitioner and a Latin-American female companion would be driving at a specific intersection and that both would be in possession of Marihuana. He gave Chavez an exact, detailed description of the two automobiles to be occupied by the two identified subjects.

With no time to obtain a search warrant, the officers drove immediately to the intersection indicated and found the Petitioner, whom Chavez knew well, and the female driving the two described automobiles. After signaling the cars to pull over, the officers prevented Petitioner from disposing of a Marihuana cigarette in his pocket. When the trunk of Petitioner's car was opened, one of the officers related there was a strong Marihuana odor. A search of the trunk revealed ninety-two (92) pounds of what was found to be Marihuana worth approximately $120,000.00.

After conviction, Petitioner appealed to the Court of Criminal Appeals of Texas and that Court affirmed the judgment on November 10, 1970.

ARGUMENT AND AUTHORITIES REASONS FOR DENYING THE WRIT

THERE WAS SUFFICIENT PROBABLE CAUSE FOR PETITIONER'S WARRANTLESS ARREST AND THE FRUITS OF THE SEARCH INCIDENT TO SAID ARREST WERE ADMISSIBLE IN EVIDENCE.

In urging the lack of probable cause for the warrantless arrest, Petitioner relies upon *Aguilar v. Texas,* 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), and *Spinelli v. United States,* 393 U.S. 410, 89 S.Ct.

584, 21 L.Ed.2d 637 (1969), both of which decisions dealt with the sufficiency of an affidavit presented to a magistrate for the issuance of a search warrant to reflect probable cause.

The Court of Criminal Appeals of Texas in its opinion held that *Draper v. United States,* 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327 (1959), controls this case. The informant there described details with a particularity which approached that of the informant in the instant case.

The United States Court of Appeals for the Fifth Circuit in *United States v. Acosta,* 411 F.2d 627, (1970), held that neither *Aguilar* nor its explication in *Spinelli* detracted from the continued vitality of *Draper.* Acosta was quoted with approval by the Court of Criminal Appeals of Texas in *Rangel v. State,* 444 S.W.2d 924 (Tex.Crim., 1969).

The Court of Criminal Appeals of Texas found that the officer had probable cause for the warrantless arrest of Petitioner, that the search incident thereto was legal and that fruits of such search were admissible in evidence. *Rangel v. State,* supra; *Alaniz and Villareal v. State,* 458 S.W.2d 813 (Tex.Crim., 1970); Article 14.03, Vernon's Texas Code of Criminal Procedure.

Both *Spinelli* and *Aguilar* were search warrant cases. In *Spinelli,* the Court said it was "especially important that the tip described the accused's criminal activities in sufficient detail so that the magistrate may know that he is relying on something more substantial than a casual rumor." The Court went on to state that such detail was present in the *Draper* case, would have been sufficient to permit a magistrate to infer that the informer had gained his information in a reliable way and was sufficient to establish probable cause.

There was certaintly probable cause for the arrest in the present case and an arrest which is lawful carries with it the right to make a search and seizure incidental thereto. *Price v. Texas,* 410 S.W.2d 778 (Tex. Crim., 1967); *Jones v. Texas,* 352 S.W.2d 270 (Tex. Crim., 1961); *Weeks v. Texas,* 417 S.W.2d 716 (Tex. Crim., 1967); *Houston v. Texas,* 428 S.W.2d 353 (Tex. Crim., 1968); *Hernandez v. Texas,* 435 S.W.2d 520 (Tex.Crim., 1968); *Garcia v. Texas,* 459 S.W.2d 840 (Tex.Crim., 1970).

The test of constitutional validity of an arrest as laid down in *Beck v. Ohio,* 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964), and adhered to in *United States v. Acosta,* supra, is "Whether, at the moment the arrest was made, the officer had probable cause to make it—whether at that moment the facts and circumstances within their knowledge and of which they had reasonable trustworthy information were sufficient to warrant a prudent man in believing that Petitioner had committed or was committing an offense." Here, Respondent submits there was sufficient probable cause for the arrest. Here, as in *Acosta* and *Draper,* ample evidence of the reliability of the informant was also present.

CONCLUSION

Respondent urges that the Court of Criminal Appeals of Texas was correct in its opinion affirming the judgment of the trial court. For the reasons above stated, Respondent respectfully urges that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gilbert J. Pena, Assistant Attorney General of Texas, certify that a copy of the foregoing Brief for Respondent in Opposition was served on the attorneys for Petitioner, by depositing same in the United States Mail, postage prepaid, certified mail, addressed to Mr. William E. Steen, Mr. L. J. Clayton, 1020 Houston First Savings Building, Houston, Texas 77002, on this the ____ day of April, 1971.

GILBERT J. PENA
Assistant Attorney General